JUN 19 1996

No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF COLUMBIA GAS OF OHIO, INC. *AS AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

ANDREW J. SONDERMAN
KENNETH W. CHRISTMAN
(Counsel of Record)
200 Civic Center Drive
P. O. Box 117
Columbus, Ohio 43216-0117
(614) 460-4655

Counsel for Amicus Curiae Columbia Gas of Ohio, Inc.

36 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Introductory Statement 1

Interest of Amicus Curiae 1

Summary of Argument 5

Argument 6

A. Ohio's comprehensive statutory scheme for taxing the sale and use of natural gas neither discriminates against nor burdens interstate commerce, and therefore does not violate the Commerce Clause of the United States Constitution 6

1. The complementary sales and use taxes imposed under §§ 5739.02 and 5741.02 of the Ohio Revised Code are facially neutral and exhibit no intent to discriminate against interstate commerce 7

2. The record fails to show that the Ohio statutory scheme has the effect of unduly burdening interstate commerce 17

B. The Ohio statutory scheme does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution . 28

Conclusion 29

TABLE OF AUTHORITIES

Cases

Page

Alaska v. *Arctic Maid*,
366 U.S. 199 (1961) 9, 10, 11, 12
Amerada Hess Corp. v. *Director, Div. of Taxation*,
490 U.S. 66 (1989) 7, 9, 10, 11, 12
14, 15, 17
Armco Inc. v. *Hardesty*,
467 U.S. 638 (1984) 8, 27
Associated Industries of Mo. v. *Lohman*,
114 S.Ct. 1815 (1994) 17, 23
Bacchus Imports, Ltd. v. *Dias*,
468 U.S. 263 (1984) 12
Boston Stock Exchange v. *State Tax Commission*,
429 U.S. 318 (1977) 7, 8
Chrysler Corp. v. *Tracy*,
652 N.E.2d 185 (Ohio 1995) 12, 15
CTS Corp. v. *Dynamics Corp. of America*,
481 U.S. 69 (1987) 9
Dunbar-Stanley Studios v. *Alabama*,
393 U.S. 537 (1969) 10, 11, 12
Fulton Corp. v. *Faulkner*,
116 S.Ct. 848 (1996) 23, 24, 25, 26
General Motors Corp. v. *Tracy*,
652 N.E.2d 188 (Ohio 1995) 7, 16
General Telephone Co. v. *Public Utilities*
Comm., 181 N.E.2d 698 (Ohio 1962) 13
Gregg Dyeing Co. v. *Query*,
286 U.S. 472 (1932) 17, 18, 28
Haefner v. *City of Youngstown*,
68 N.E.2d 64 (Ohio 1946) 19, 27

TABLE OF AUTHORITIES (Cont'd)

Page

Halliburton Oil Well Cementing Co. v. *Reily*, 373 U.S. 64 (1963) 9, 17-18, 23, 27
Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937) 8
Industrial Gas Co. v. *Public Utilities Comm.*, 21 N.E. 2d 166 (Ohio 1939) 12
Interstate Busses Corp. v. *Blodgett*, 276 U.S. 245 (1928) 18
Kraft General Foods v. *Iowa Dept. of Revenue and Finance*, 505 U.S. 71 (1992) 9
Maryland v. *Louisiana*, 451 U.S. 725 (1981) 27
New Energy Co. of Indiana v. *Limbach*, 486 U.S. 269 (1988) 7
Norton Co. v. *Department of Revenue*, 340 U.S. 534 (1951) 17
Oregon Waste Systems v. *Department of Environmental Quality*, 114 S.Ct. 1345 (1994) 27
Postal Telegraph Cable Co. v. *Adams*, 155 U.S. 688 (1895) 24
Railway Express Agency v. *Virginia*, 358 U.S. 434 (1959) 24, 25
Tyler Pipe Industries v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987) 27
Yankee Resources, Inc., Case No. 82-1086-GA-ARJ, Ohio Public Utilities Comm. (Sep. 9, 1982) (unreported) 12

Constitutional Provisions and Statutes

U.S. Constitution, art. I, § 8 ..... 6 and *passim*
U.S. Constitution, amend. XIV, § 1 28

TABLE OF AUTHORITIES (Cont'd)

Page

Ohio Rev. Code Ann. § 1723.01, (Anderson 1996) 13
Ohio Rev. Code Ann. Chapter 4905 (Anderson 1996) 12
Ohio Rev. Code Ann. § 4905.02 (Anderson 1996) 2
Ohio Rev. Code Ann. § 4905.03 (Anderson 1996) 2
Ohio Rev. Code Ann. § 4905.04 (Anderson 1996) 2
Ohio Rev. Code Ann. § 4905.05 (Anderson 1996) 2
Ohio Rev. Code Ann. § 4905.06 (Anderson 1996) 2
Ohio Rev. Code Ann. § 4905.10 (Anderson 1996) 19
Ohio Rev. Code Ann. § 4905.22 (Anderson 1996) 13
Ohio Rev. Code Ann. § 4905.302 (Anderson 1996) 13
Ohio Rev. Code Ann. § 4905.32 (Anderson 1996) 13
Ohio Rev. Code Ann. § 4905.92 (Anderson 1996) 27
Ohio Rev. Code Ann. Chapter 4909 (Anderson 1996) 12
Ohio Rev. Code Ann. § 4909.15 (Anderson 1996) 13, 26
Ohio Rev. Code Ann. § 4909.161 (Anderson 1996) 26
Ohio Rev. Code Ann. § 4909.17 (Anderson 1996) 13

TABLE OF AUTHORITIES (Cont'd)

Page

Ohio Rev. Code Ann. § 4911.18
(Anderson 1996) 19
Ohio Rev. Code Ann. § 5727.01
(Anderson 1996) 2, 8
Ohio Rev. Code Ann. § 5727.111
(Anderson 1996) 27
Ohio Rev. Code Ann. § 5727.30
(Anderson 1996) 18
Ohio Rev. Code Ann. § 5727.38
(Anderson 1996) 18, 19
Ohio Rev. Code Ann. § 5739.01
(Anderson 1996) 22, 23
Ohio Rev. Code Ann. § 5739.011
(Anderson 1996) 23
Ohio Rev. Code Ann. § 5739.02
(Anderson 1996) 2, 5, 7, 8
Ohio Rev. Code Ann. § 5739.025
(Anderson 1996) 7, 8
Ohio Rev. Code Ann. § 5741.02
(Anderson 1996) 2, 5, 7, 8, 23

Session Laws

Amended Substitute House Bill 476 (1996) 5
116 Ohio Laws 41 (1935) 15
116 Ohio Laws 101 (1935) 15

Administrative Regulations

Ohio Admin. Code Chapter 4901:1-14
(Banks-Baldwin 1996) 13
Ohio Admin. Code Rule 4901:1-14-01(I)
(Banks-Baldwin 1996) 22

TABLE OF AUTHORITIES (Cont'd)

Page

Ohio Admin. Code Chapter 4901:1-18 (Banks-Baldwin 1996) 13
Ohio Admin. Code Rule 5703-9-26 (Banks-Baldwin 1996) 22

Miscellaneous Authority

Garfield, P. and Lovejoy, W. F., Public Utility Economics (1964) 26
Hellerstein, W., *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405 (1986) 24

BRIEF OF COLUMBIA GAS OF OHIO, INC. AS *AMICUS CURIAE*

INTRODUCTORY STATEMENT

This brief is submitted by Columbia Gas of Ohio, Inc. as *amicus curiae* in support of Respondent Roger W. Tracy, Tax Commissioner of Ohio. Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

Columbia Gas of Ohio, Inc. ("Columbia") is an Ohio corporation engaged in the distribution and sale of natural gas to approximately 1.2 million retail customers throughout the State of Ohio. Four of Columbia's sister companies provide similar gas distribution service to an additional 681,000 customers in the neighboring states of Kentucky, Pennsylvania, Maryland, and Virginia.[2] All of these companies, including Columbia, are wholly-owned subsidiaries of The Columbia Gas System, Inc., a Delaware Corporation, which is one of the largest integrated natural gas systems in the United States. Through its various subsidiaries, The Columbia Gas System is engaged in the production, transmission, and distribution of natural gas throughout much of the nation.

For commercial and industrial customers such as Petitioner, General Motors Corporation, Columbia offers

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Rules of this Court.

[2] The four sister companies are Columbia Gas of Kentucky, Inc., Columbia Gas of Pennsylvania, Inc., Columbia Gas of Maryland, Inc., and Commonwealth Gas Services, Inc.

both gas sales and gas transportation service, and the customer is free to select either or both of these services. If the customer selects sales service, Columbia purchases gas supplies from various third party suppliers, and delivers those supplies to the customer's premises for sale. If the customer selects gas transportation service, the customer is responsible for acquiring its own gas supplies directly from natural gas producers or marketers, such as Mobil Natural Gas, Inc. or Enron Capital and Trade (formerly Access Energy Corporation), and arranging to have those supplies delivered to Columbia. Columbia then redelivers the gas to the customer's factory or business location. In either case, the gas is ultimately delivered to the customer through the same pipeline facilities of Columbia.

Since Columbia is "engaged in the business of supplying natural gas . . . to consumers," it is a "natural gas company" within the meaning of Ohio Rev. Code Ann. § 4905.03(A)(6), and is therefore a "public utility" subject to the regulatory jurisdiction of the Ohio Public Utilities Commission. Ohio Rev. Code Ann. §§ 4905.02, 4905.04, 4905.05, and 4905.06. These activities also make Columbia a "natural gas company" for purposes of Ohio Rev. Code Ann. § 5727.01(D)(4), and Columbia's sales of natural gas to retail customers are therefore exempt from the Ohio sales and use taxes by virtue of Ohio Rev. Code Ann. §§ 5739.02(B)(7) and 5741.02(C)(2).

Petitioner's central contention in this proceeding is that this exemption renders the use tax unconstitutional, in violation of both the Commerce and Equal Protection Clauses of the United States Constitution, because the tax impermissibly discriminates against "out-of-state" gas marketers, such as Petitioner's various suppliers, and in favor of "local" gas utilities, such as Columbia. Pet. Brief

9-11.[3] An *amicus* brief submitted by the Chamber of Commerce of the United States, the National Association of Manufacturers, two interstate pipelines, and a natural gas marketing company contends that this exemption also frustrates federal natural gas policy, which encourages open competition among suppliers. Amicus Brief 11-13. If Petitioner and its supporting *amici* were to prevail on those arguments, any resulting modification of the Ohio tax laws might well increase the relative tax burden borne by natural gas utilities, such as Columbia, and their customers, while decreasing the burden on competing natural gas producers and marketers. As a result, Columbia clearly has a vital interest in the outcome of this proceeding.

Columbia, like Petitioner and its supporting *amici*, strongly supports the development of a competitive, national market for natural gas, in which individual customers are permitted to choose among competing suppliers. Historically, Columbia has been a leader in developing and offering the very gas transportation programs that make such competition possible, by allowing customers such as Petitioner to purchase gas directly from third-party suppliers, rather than purchasing all of their supplies from a natural gas utility such as Columbia. In the early 1970s, Columbia offered one of the first such gas transportation programs in the nation. Today, Columbia offers gas transportation service to all of its commercial and industrial

---

[3] The following abbreviations are used in this brief: "Pet. Brief" refers to the Petitioner's Brief. "Pet. Opp." refers to the Respondent's Brief in Opposition to the Petition for Certiorari. "Amicus Brief" refers to the Brief of *Amici Curiae* filed by the Chamber of Commerce of the United States, the National Association of Manufacturers, Coastal Gas Marketing Co., ANR Pipeline Company, and Colorado Interstate Pipeline Co. "J.A." refers to the Joint Appendix filed with the Court.

customers, from the largest manufacturing facility to the smallest corner drugstore or fast food restaurant, and the company is currently developing a program that would extend the benefits of gas transportation service to individual residential customers.

Columbia also opposes the imposition of discriminatory state taxes, because Columbia recognizes, as Petitioner does, that such taxes may affect customers' purchasing decisions. Columbia fully agrees that state taxes should not provide either a competitive advantage or disadvantage to *any* class of sellers, including natural gas marketers or natural gas utilities.

Columbia cannot, however, agree that the existing Ohio statutory scheme unconstitutionally discriminates against out-of-state natural gas marketers, or in favor of natural gas utilities. As more fully explained in the **Argument** section, *infra*, natural gas marketers and natural gas utilities are engaged in fundamentally different businesses. They have different rights and responsibilities, and there are significant differences in the manner in which they are permitted to sell natural gas to consumers. For example, marketers are free to sell gas at negotiated prices, while utilities must charge a regulated price which reflects a company-wide average gas cost, irrespective of the customer's size or usage characteristics. Furthermore, utilities are limited to a dollar-for-dollar pass-through of their actual gas costs, without any markup or profit. Thus, while it is true, as Petitioner contends, that marketers and utilities both sell natural gas to burner-tip customers, Pet. Brief 4, they are certainly not competing on a "level playing field," and were not doing so during the audit period in this case

(1986-90).[4] As a result of such factors, natural gas marketers and natural gas utilities are not similarly situated for purposes of the Commerce Clause, and there is nothing in the Clause that requires the state to impose identical taxes upon such entities.

In addition, Petitioner has selectively focused on the application of the Ohio use tax, while virtually ignoring all other Ohio taxes which are occasioned by the retail purchase and consumption of natural gas. When Petitioner's argument is properly analyzed in the context of *all* state taxes that apply to such transactions, including the various revenue-based taxes that apply to gas utilities in lieu of the use tax, it is apparent that the Ohio statutes neither discriminate against nor burden sales of natural gas by out-of-state gas marketers, and therefore violate neither the Commerce Clause nor the equal protection rights of such marketers.

SUMMARY OF ARGUMENT

The complementary sales and use taxes imposed under Ohio Rev. Code Ann. §§ 5739.02 and 5741.02 are facially neutral and exhibit no intent to discriminate against interstate commerce. These taxes are applied on a uniform basis, irrespective of where the gas originates or where the customer takes title to that gas. A retail customer purchasing gas from an out-of-state marketer will

---

[4] Amended Substitute House Bill 476, which was signed into law by the Governor of Ohio on June 18, 1996, will allow gas utilities to make unregulated sales of gas under certain circumstances, but the provisions of that law have not yet been implemented, and in any event, they have no bearing upon events that occurred during the audit period.

pay exactly the same tax as a similarly situated customer purchasing gas from a marketer located in Ohio.

The exemption from the use tax for sales by natural gas companies is likewise facially neutral and exhibits no discriminatory intent. It is based solely upon the nature of the seller's business, and not upon any factors relating to interstate commerce.

Finally, the record fails to show that the existing Ohio statutory scheme either favors natural gas utilities or has a discriminatory effect which burdens out-of-state gas marketers. Ohio imposes a series of revenue-based taxes on natural gas utilities that are as onerous, if not more so, than the use tax imposed upon gas purchased from out-of-state marketers. This effectively negates any claim that the existing statutes violate either the Commerce Clause or the equal protection rights of Petitioner's suppliers.

ARGUMENT

A. Ohio's comprehensive statutory scheme for taxing the sale and use of natural gas neither discriminates against nor burdens interstate commerce, and therefore does not violate the Commerce Clause of the United States Constitution.

The Commerce Clause, which is contained in Article I, section 8, of the United States Constitution, provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." It is now well-established that the Commerce Clause not only grants Congress the affirmative power to regulate interstate commerce; it also prohibits the states from engaging in "economic protectionism" designed to benefit

in-state economic interests while burdening out-of-state competitors. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988). In particular, no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329 (1977). A state tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce. *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66, 75 (1989).

Petitioner argues that the use tax imposed under Ohio Rev. Code Ann. § 5741.02 violates the Commerce Clause, because it discriminates against sales by out-of-state gas marketers, and in favor of sales by "local" gas utilities. The Ohio Supreme Court rejected that argument. *General Motors Corp.* v. *Tracy*, 652 N.E.2d 188 (Ohio 1995). For the reasons set forth herein, Columbia contends that the Ohio Supreme Court's decision was correct and urges this Court to affirm that decision.

1. The complementary sales and use taxes imposed under §§ 5739.02 and 5741.02 of the Ohio Revised Code are facially neutral and exhibit no intent to discriminate against interstate commerce.

Ohio, like most states, imposes complementary sales and use taxes on the purchase or subsequent use of tangible personal property, including natural gas. If a sale of gas occurs within Ohio, the state imposes a 5% sales tax on the transaction. Ohio Rev. Code Ann. §§ 5739.02 and 5739.025. If the sale occurs outside the state but the gas is ultimately consumed within Ohio, the state levies a 5%

percent use tax on the "storage, use, or other consumption" of gas which occurs within the state. Ohio Rev. Code Ann. §§ 5741.02 and 5739.025. (Local governments are permitted to levy certain additional taxes which increase the rate of the sales and use taxes.) The sales and use taxes are "complementary" in the sense that the use tax does not apply to any transaction upon which the sales tax has been imposed and paid. Ohio Rev. Code Ann. § 5741.02(C)(1). As a result, the sales and uses taxes, taken together, are facially neutral and are applied in a non-discriminatory manner. Customers purchasing natural gas will pay exactly the same tax (whether denominated as a sales or use tax) irrespective of where the gas originates, where they took title to the gas, or whether they purchased that gas from a local or out-of-state supplier. In this respect, the Ohio sales and use taxes are virtually identical to the Washington sales and use taxes which this Court upheld almost sixty years ago in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937).

The use tax does not apply to gas sold by natural gas utilities (which are statutorily defined as "natural gas companies"), Ohio Rev. Code Ann. §§ 5727.01(D)(4), 5739.02(B)(7) and 5741.02(C)(2), but that exemption is likewise facially neutral. It applies to *all* sales of gas by such companies, irrespective of where the gas originated, where the utility took title to the gas, or whether that gas was acquired from a local or out-of-state supplier. As a result, the exemption neither taxes a transaction or incident more heavily when it crosses a state line, *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), nor otherwise discriminates on the basis of some "interstate element." *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 332 (1977). The exemption is based solely upon the nature of the

seller's business, and not upon any factors relating to interstate commerce.

Petitioner nonetheless argues that the exemption for sales by natural gas utilities facially discriminates against interstate commerce, because it provides a direct commercial advantage to local business. Pet. Brief 9, 17. Although the exemption is not facially discriminatory in the typical sense, because "there is no explicit discriminatory design" which favors local businesses, *Amerada Hess Corp.* v. *Director, Div. of Revenue*, 490 U.S. 66, 76 (1989), Petitioner contends that the exemption necessarily favors local businesses, because under Ohio law, the definition of a "natural gas company" is limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." Pet. Brief 6. While the definition of a "natural gas company" is, in fact, limited to such entities, it does not follow that the use tax impermissibly discriminates against interstate commerce.

In considering claims of discrimination under the Commerce Clause, it is necessary to compare entities that are similarly situated. *Kraft General Foods* v. *Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80 (Fn. 23) (1992); *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 88 (1987); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963). If taxpayers are engaged in different businesses, they are not similarly situated for purposes of the Commerce Clause, and the Clause imposes no "iron rule of equality" with respect to taxes assessed on different types of businesses. *Alaska* v. *Arctic Maid*, 366 U.S.199, 205 (1961).

This principle is perhaps best illustrated by the Court's recent decision in *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66 (1989). In that case, several oil

producers challenged an "add-back" provision of the New Jersey Corporation Business Tax Act that prohibited them from deducting, for state tax purposes, the Windfall Profit Tax that they paid to the federal government. The adverse effect was limited to oil producers, since the Windfall Profit Tax did not apply to oil retailers or other entities. Furthermore, since there are no oil reserves in New Jersey, all of the activities that gave rise to the adverse impact of the challenged tax provision necessarily took place outside the state, and purely "local" businesses were not affected. The oil producers argued that the add-back provision therefore violated the Commerce Clause, because it discriminated against oil producers who market their oil and in favor of independent retailers who do not produce oil. The Court rejected that contention. Even though the producers and retailers were obviously competitors engaged in the sale of the same product, the Court found that the add-back provision did not discriminate against interstate commerce, because any differences in the effect of that provision resulted "solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78.

The Court reached similar conclusions in *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961) and *Dunbar-Stanley Studios* v. *Alabama*, 393 U.S. 537 (1969). *Arctic Maid* involved a tax which Alaska had imposed on "freezer ships" operating in territorial waters off its coast. The freezer ships gathered fish which had been caught by their own "catcher boats" or by independent operators; froze the fish; and then transported them to out-of-state locations for canning. Since Alaska imposed no similar tax on salmon caught and frozen in Alaska for delivery to local canneries, the tax was challenged on the grounds that it violated the Commerce Clause by discriminating against the freezer

ships. The Court rejected that challenge. Noting that the Commerce Clause imposes no strict rule of equality with respect to taxes assessed on different types of businesses (and also noting that local canneries paid an even higher tax than the freezer ships), the Court held that any difference between the taxes imposed upon the freezer ships and their competitors was not so "palpably disproportionate . . . as to run afoul of the Commerce Clause." 366 U.S. at 205.

In *Dunbar-Stanley Studios*, the State of Alabama imposed a tax of three to five dollars per week on transient or traveling photographers (depending upon the size of the towns in which they were operating), and twenty-five dollars per year on photographers operating in fixed locations. The fixed-location photographers (like Ohio's gas utilities) were necessarily located within the state, while at least some of the transient photographers were engaged in interstate travel. A photography firm challenged the tax on transient photographers, claiming that it discriminated against interstate commerce. The Court rejected that claim, noting that the tax applied equally to transient photographers who were engaged in interstate travel and those who traveled solely within the state. The Court also found no evidentiary basis upon which to conclude that the tax on out-of-state transient photographers was so disproportionate to the tax imposed on fixed-location photographers as to "bear unfairly on the former." 393 U.S. at 542. The Court went on to suggest that even if the tax on transient photographers had amounted to *twice* the tax imposed upon those operating in fixed locations, the tax might not have been unconstitutional, "given the differences between the two ways of carrying on the business." *Id.* (Fn. 5).

The fundamental principle that emerges from *Amerada Hess, Arctic Maid*, and *Dunbar-Stanley Studios* is that a state may, without violating the Commerce Clause, impose different taxes upon different types of businesses. This is true even if the entities are competitors who sell the same product (oil), provide the same service (taking photographs), or engage in the same commercial activity (gathering and transporting fish for canning).[5] That principle is directly relevant here. Despite the fact that natural gas utilities and natural gas marketers sell the same product to the same customers, they are engaged in fundamentally different businesses.

Natural gas utilities are classified as public utilities, and their rates, services, and operations are therefore subject to extensive regulation. *See generally*, Ohio Rev. Code Ann. Chapters 4905 and 4909. Natural gas marketers are not classified as public utilities, *Chrysler Corp.* v. *Tracy*, 652 N.E.2d 185 (Ohio 1995); *Yankee Resources, Inc.*, Case No. 82-1086-GA-ARJ (Ohio Pub. Util. Comm. Sep. 9, 1982) (unreported) (Pet. Opp. 2a-5a), and face no similar regulatory constraints.

Natural gas utilities are legally obligated to serve the public, without discrimination, throughout their field of operations. *Industrial Gas Co.* v. *Public Utilities Comm.*, 21 N.E.2d 166 (Ohio 1939). Natural gas marketers are free to select their own customers. J.A. 199.

Natural gas utilities may charge only those rates which have been found to be "just and reasonable" by the Ohio Public Utilities Commission, and cannot change those

---

[5] In this regard, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), cited by Petitioner, is clearly distinguishable. The tax in that case discriminated among entities who were engaged in the *same* business, i.e., the sale of liquor at wholesale.

rates without formal regulatory approval. *General Telephone Co.* v. *Public Utilities Comm.*, 181 N.E.2d 698 (Ohio 1962); Ohio Rev. Code Ann. §§ 4905.22, 4905.32, 4909.15, and 4909.17. Their rates are set using a statutory formula, which is based on the cost of providing service plus a "fair and reasonable" return on investment. Ohio Rev. Code Ann. § 4909.15. With respect to one major category of expense, the cost of obtaining natural gas supplies for their customers, natural gas utilities are limited to a dollar-for-dollar pass-through of those costs without any markup or profit. Ohio Rev. Code Ann. § 4905.302; Ohio Adm. Code Chapter 4901:1-14. Furthermore, the sales price charged by natural gas utilities must reflect a single, average cost of gas, irrespective of the customer's size or usage characteristics. *Id.* Natural gas marketers, on the other hand, are free to negotiate their prices and other contract terms on a case-by-case basis, J.A. 199-200, and may earn whatever profit the market allows.

Natural gas utilities, like state and local governments, may use the power of eminent domain to appropriate private property where necessary to fulfill their public service obligations. Ohio Rev. Code Ann. § 1723.01. Natural gas marketers have no such power. J.A. 201. Natural gas utilities typically hold franchises granted by municipal governments, which allow their pipelines and other facilities to occupy the streets and public rights-of-way. Natural gas marketers own no such facilities (J.A. 202), and hold no such franchises.

Natural gas utilities must administer extensive social programs, such as the Percentage of Income Payment Plan, which help to assure continued service to low-income customers by limiting the utilities' ability to disconnect service for nonpayment. Ohio Admin. Code Chapter 4901:1-18.

Natural gas marketers are free to terminate service in accordance with the terms of their contracts.

In short, natural gas utilities are heavily regulated businesses with special rights and responsibilities that are not shared by the general business community. They face significant regulatory constraints on the manner in which they are permitted to sell natural gas to consumers. Natural gas marketers, on the other hand, are essentially unregulated commodity merchants. By any reasonable measure, these entities represent two very different types of businesses. As a result, there is absolutely nothing in the Commerce Clause that requires Ohio to impose identical taxes upon such entities, and the exemption of natural gas companies from the Ohio use tax does not facially discriminate against interstate commerce. Any differences in the resulting tax treatment result "solely from differences between the nature of their businesses, not from the location of their activities." *Amerada Hess Corp.*, 490 U.S. at 78.[6]

In addition, the Ohio statutes exhibit absolutely no evidence of discriminatory intent. The Ohio General Assembly could not have been motivated by any intent to discriminate against out-of-state gas marketers when it first exempted sales by natural gas companies from the use tax, because that exemption has existed since the sales and use taxes were first enacted in 1935, several decades before the availability of gas transportation programs allowed

---

[6] Although Petitioner maintains that the location of the exempt seller *is* the determinative factor for purposes of the sales and use taxes, Pet. Brief 19 (Fn.15), this is clearly not the case. If the location *was* determinative, the sales tax would not apply to sales by in-state natural gas marketers. That alone demonstrates that the determinative factor is the nature of the seller's business, and not the seller's location.

customers to purchase gas from marketers instead of natural gas utilities. 116 Ohio Laws 41, 43-44, 101, 102-3 (1935).

Nor is the exemption for natural gas utilities motivated by any desire to exert pressure on out-of-state marketers to conduct their business in Ohio, *Amerada Hess*, 490 U.S. at 77-78, since such sales would still be subject to an equal sales tax. The only way that out-of-state marketers could avoid the imposition of the sales or use tax on the gas that they sell is to get into an entirely new line of business by becoming public utilities.

Petitioner further argues that the taxability of a sale or purchase depends not on the character of the seller as a public utility, but on whether the seller owns distribution equipment and facilities within the state and uses such equipment and facilities to deliver gas to consumers. Pet. Brief 6. That argument misses the point, because the two are basically inextricable. Under Ohio law, it is the ownership or operation of such facilities, and the use of those facilities to deliver gas to consumers, that causes an entity to be characterized as a public utility. *Chrysler Corp.* v. *Tracy*, 652 N.E.2d 185 (Ohio 1995).

Finally, Petitioner argues that the use tax exemption for natural gas utilities discriminates against goods which are delivered into the state by "common carriage" rather than by the seller's own distribution network. Pet. Brief. 21-22. That argument also misses the point, because natural gas is delivered through the same interstate pipelines and local distribution facilities whether it is sold by natural gas marketers or natural gas utilities. Since Petitioner has effectively conceded as much, Pet. Brief 25, that argument should be rejected.

For the foregoing reasons, Columbia submits that the Ohio sales and uses taxes are facially neutral, that they

exhibit no discriminatory intent, and that the exemption for natural gas utilities is based solely upon the nature of their business, and not upon factors relating to interstate commerce. It was essentially upon this basis that the Ohio Supreme Court rejected Petitioner's claim:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; *he treats purchases from both the same.*

652 N.E.2d at 190 (emphasis supplied). In other words, the court found that the Ohio statutes did *not* discriminate against interstate commerce, because all similarly situated sellers were treated alike. Since the Constitution requires nothing more, the court's judgement should be affirmed.[7]

---

[7] Petitioner and its supporting *amici* argue at great length that the Ohio Supreme Court improperly upheld the use tax, despite its discrimination against interstate commerce, because the tax also burdened a portion of *intrastate* commerce. Pet. Brief 11-17; Amicus Brief 10-11; Brief of Process Gas Consumers Group and Natural Gas Supply Association 11-13. That mischaracterizes the court's decision. What the court found was that the use tax did *not* discriminate against interstate commerce, and therefore, did not violate the Commerce Clause.

2. The record fails to show that the Ohio statutory scheme has the effect of unduly burdening interstate commerce.

Even if a tax is facially neutral, it may be deemed to violate the Commerce Clause if it has a discriminatory effect which unduly burdens interstate commerce. *Amerada Hess Corp.* v. *Director, Div. of Revenue*, 490 U.S. 66, 75 (1989). Since it is actual, and not hypothetical, discrimination that violates the Commerce Clause, *Associated Industries of Mo.* v. *Lohman*, 114 S.Ct. 1815, 1824 (1994), this is essentially a question of fact, upon which the Petitioner has the burden of proof. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951) ("[A] taxpayer claiming immunity from a tax has the burden of establishing his exemption."); *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 481 (1932) ("Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State.") Petitioner has clearly failed to sustain that burden.

The major flaw in Petitioner's analysis is that it focuses exclusively on the Ohio use tax, while virtually ignoring the other Ohio taxes which are occasioned by the sale and consumption of natural gas. The use tax cannot be viewed in isolation. As the Court held in *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 480:

> There is no demand in [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.

A proper analysis, therefore, "must take the whole scheme of taxation into account," *Halliburton Oil Well Cementing*

Co. v. *Reily*, 373 U.S. 64, 69 (1963) (internal quotation marks omitted), including taxes which are imposed upon natural gas utilities in lieu of the use tax.

Petitioner, moreover, cannot "establish discrimination by showing merely that the [different taxing] statutes are different in form or adopt a different measure or method of assessment . . . " *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 251 (1928). This Court is "not concerned with what the tax is called but with what the statute does." *Gregg Dyeing Co.*, 286 U.S. at 478. Furthermore, the Court's ultimate decision is "not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court." *Id.* at 476. Instead, "the controlling test is found in the operation and effect of the statute as applied and enforced by the State." *Id.* In other words, for purposes of the Commerce Clause, the critical consideration is the bottom-line economic impact upon taxpayers. As the Court explained more recently in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." It is therefore essential to evaluate the Ohio use tax in the context of *all* state taxes which are occasioned by the retail sale and consumption of natural gas.

As previously explained, a customer who purchases natural gas from a natural gas marketer will pay either the sales or use tax, depending upon whether the sale occurred within or outside the state. If, on the other hand, the customer purchases gas from a natural gas utility, the sales and use taxes do not apply, but the state imposes three different taxes upon the "gross receipts" derived from that sale: (1) a public utility excise tax (Ohio Rev. Code Ann. §§ 5727.30, 5727.38); (2) a PUCO maintenance tax, to fund

the operations of the Ohio Public Utilities Commission (Ohio Rev. Code Ann. § 4905.10); and an OCC maintenance tax, to fund the operations of the Ohio Office of Consumers' Counsel (Ohio Rev. Code Ann. § 4911.18) (hereinafter collectively "the gross receipts taxes") .

It has long been clear, moreover, that these gross receipts taxes are imposed in lieu of the sales and use taxes, and *vice versa*. As the Ohio Supreme Court explained in *Haefner* v. *City of Youngstown*, 68 N.E.2d 64 (Ohio 1946):

> A reason for exempting sales by public utilities [from the sales and use taxes] is found in the fact that their gross receipts are subject to a state excise tax . . .
>
> [T]he whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the "gross receipts" of utilities that are subject to the excise tax . . .

68 N.E.2d. at 66, 67.

The public utility excise tax is imposed at a nominal rate of 4.75% (Ohio Rev. Code Ann. § 5727.38), while the PUCO and OCC maintenance taxes fluctuate from year to year, depending upon the amounts appropriated by the Ohio General Assembly to fund the activities of those agencies. The current rate of the PUCO maintenance tax is .1299% (for the 1995 tax year) and the current rate of the OCC maintenance tax is .0310%. During the audit period under review in this case (1986-90), the PUCO maintenance tax ranged from a low of .1031% in 1986 to a high of .1230 % in 1989, while the OCC tax ranged from a low of .0286% in 1986 to a high of .0344% in 1988. The specific

rates for each year in the audit period are set forth in the margin.[8]

At first glance, it might appear that the use tax is still more burdensome, because the total current rate of the gross receipts taxes (4.91%) is still less than the 5% base rate for the use tax. It is important, however, to distinguish between the nominal rates of these taxes and the actual, effective rates as they apply to specific taxpayers. There are three major factors that alter the effective rates.

The first is the "tax on tax" effect that one encounters with any revenue-based tax, which serves to increase the effective rate of the gross receipts taxes. Although this concept may seem somewhat esoteric, it can be illustrated with a fairly straightforward example. If Petitioner were to purchase one hundred dollars worth of natural gas from a natural gas marketer in Texas for ultimate consumption at its manufacturing plants in Ohio, a 5% use tax ($5.00) would be assessed as a result of the transaction (assuming that local governments had not levied any additional taxes). When the $5.00 was paid, the transaction would be complete, and Petitioner would owe no further tax.

If, on the other hand, Petitioner purchased the same quantity of gas from a gas utility, such as Columbia, at the same price ($100.00), the State would assess gross receipts taxes totaling 4.91% (at current tax rates) on the revenues collected by the utility for that sale, and the utility would

[8] The PUCO and OCC maintenance tax rates (in percentages) for the audit period were as follows:

	1986	1987	1988	1989	1990
PUCO	.1031	.1171	.1224	.1230	.1191
OCC	.0286	.0320	.0344	.0333	.0343

owe the State $4.91 in tax. However, when the utility collected the additional $4.91 from Petitioner in order to cover that tax expense, that $4.91 would itself become part of the utility's taxable gross receipts, and the utility would then owe an additional 4.91% of that $4.91, or $.24. In order to make the utility whole and permit it to recover the total tax expense incurred in providing service, the total amount of revenue collected for the sale ($100.00) must be increased by an amount equal to the original gross receipts ($100.00) multiplied by the quantity of 1/1-T, where T equals the nominal rate of the gross receipts taxes (4.91%). Although this process may seem complex, this is precisely how the Ohio Public Utilities Commission sets utility rates in order to allow utilities to recover the various gross receipts taxes from their customers. In this particular instance, the calculation produces an *effective* rate of the gross receipts taxes of 5.16%, which exceeds the base rate of the use tax imposed by the State on gas supplied by out-of-state gas marketers. One can make similar calculations for each year in the audit period. The lowest effective rate was 5.13% for 1986, which still exceeds the base rate for the use tax.[9]

The second such factor involves the base upon which the various taxes are calculated. When utilities sell gas to

---

[9] The calculation of the 5.16% effective rate of the gross receipts taxes can be mathematically verified as follows, assuming an original purchase price of $100.00:

Total Amount Collected from Customer (assuming 5.16% effective tax rate)	105.16
PUCO Tax (.001299 × .105.16)	−.14
OCC Tax (.000310 × 105.16)	−.03
Pub. Util. Excise Tax (.0475 × 105.16)	−4.99
Original Purchase Price (unadjusted for taxes)	100.00

consumers, they do so on a "bundled" basis, which means that the sales price includes all costs of obtaining and delivering that gas to the utility, including the transportation charges of interstate pipeline companies. Ohio Admin. Code Rule 4901:1-14-01(I). The gross receipts taxes apply to the entire amount, including those transportation charges. Marketers, on the other hand, have the option of delivering gas to a customer at a receipt point outside Ohio, allowing title to pass at that point, and then having the customer to contract directly with the interstate pipelines for delivery of the gas. J.A. 141-42, 210-11. The record shows that Petitioner and its suppliers have, in fact, utilized that option; Petitioner has purchased gas from marketers; taken title to the gas outside the State of Ohio; and contracted directly with interstate pipelines for the delivery of that gas. *Id., see also,* J.A. 23-4, 30. In those instances, the "price" of the gas, upon which the use tax is calculated, would *not* include the interstate pipeline transportation charges, because it does not include delivery charges incurred after title has passed to the purchaser. Ohio Rev. Code Ann. § 5739.01(H); Ohio Admin. Code Rule 5703-9-26. While the exact effect of this exclusion cannot be calculated from the record in this case, it obviously serves to decrease the effective rate of the use tax, *vis-a-vis* the gross receipts taxes.

The third such factor is the "manufacturers' use exemption," which also serves to decrease the effective rate of the use tax. If Petitioner were to purchase its gas supplies from a gas utility, such as Columbia, the gross receipts taxes would apply to *all* revenues derived from those sales, irrespective of how Petitioner used the gas. The use tax, on the other hand, does not apply to any gas which Petitioner uses "primarily in a manufacturing operation to produce tangible personal property for sale." Ohio Rev. Code Ann.

§§ 5739.01(E)(9), 5739.011(B)(8), and 5741.02(C)(2); J.A.73. Although Petitioner characterizes this exemption as "a minor exception not relevant to this case," Pet. Brief 6, the evidentiary record indicates that the volume of gas subject to this exemption is "[p]robably the majority" of Petitioner's usage. J.A. 74. If one conservatively estimates that 50% of Petitioner's gas usage is subject to the manufacturers' use exemption, the *effective* rate of its use tax would not exceed 3.5%, even if additional taxes imposed by local governments produced a nominal use tax rate of 7%, which Petitioner concedes to be the maximum permitted by Ohio law. Pet. Brief 5. Since an effective rate of 3.5% is considerably lower than even the nominal rate of the public utility excise tax (4.75%), it is apparent that the use tax does not discriminate against sales of gas by out-of-state marketers, and therefore does not burden interstate commerce.[10]

Petitioner essentially argues that the various gross receipts taxes imposed upon natural gas utilities cannot be considered in this analysis, because they fail to qualify as "compensatory taxes" under the test enunciated in *Fulton Corp.* v. *Faulkner*, 116 S.Ct. 848 (1996). Pet. Brief 17-18. That argument should be rejected.

---

[10] Columbia is aware of the Court's reluctance to engage in detailed examinations of relative tax burdens, especially where it requires complex economic analyses. *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 859 (1996); *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1825 (Fn. 5) (1994). The analysis presented here, however, can be performed using only the existing tax rates, the evidence in the record, and some basic arithmetic. Such an analysis is essential, moreover, if the ultimate decision is to be based upon "dollars and cents," and not "legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

To begin with, the *Fulton* test is not applicable to the facts of this case, because it applies only where a state tax facially discriminates against interstate commerce. In cases such as this, where the challenged tax is not facially discriminatory (or even arguably not so), but where taxes on interstate commerce are imposed *in lieu* of taxes on intrastate commerce, the Court applies a "somewhat different standard." *Fulton*, 116 S.Ct. at 854 (Fn. 2). Under that standard, the challenged tax is upheld if it constitutes the "just equivalent" of the tax in lieu of which it is imposed. *Railway Express Agency* v. *Virginia*, 358 U.S. 434, 436 (1959); *Postal Telegraph Cable Co.* v. *Adams*, 155 U.S. 688, 696-97 (1895); *see also*, W. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 420-22 (1986).

In *Railway Express Agency*, for example, this Court upheld a Virginia franchise tax on express companies engaged in interstate commerce that had been imposed "in lieu of all other property taxes on intangibles and rolling stock." 358 U.S. at 435. The taxpayer argued that the new franchise tax, which amounted to $139,739.66, was not the "just equivalent" of the tax in lieu of which it was imposed, because that tax, which applied only to rolling stock and cash, would have yielded just $679.77. The Court rejected that argument on the grounds that the new franchise tax was "not only in lieu of the previous tax on rolling stock and cash on hand," but also reached "intangible rights of great value . . . " 358 U.S. at 445. In doing so, moreover, the Court made it clear that precise mathematical equivalence was not required:

> [W]e will not inquire into the exactitudes of the formula where appellant has not shown it be so baseless as to violate due process.

358 U.S. at 436. Under that standard, the Ohio use tax clearly constitutes the "just equivalent" of the gross receipts taxes, and the use tax should therefore be sustained.

Assuming, however, for the sake of argument, that the *Fulton* test applies, the Ohio gross receipts taxes clearly satisfy the requirements of that test. In *Fulton*, the Court held that even a facially discriminatory tax may survive Commerce Clause scrutiny if it is truly a "compensatory" tax designed to make interstate commerce bear a burden already borne by intrastate commerce. 116 S.Ct. at 854. The Court then outlined the three conditions necessary for a valid compensatory tax. First, the state must identify the intrastate tax burden for which it is attempting to compensate. Second, the tax on interstate commerce must "roughly approximate," but not exceed, the tax on intrastate commerce. And third, the taxes must be imposed on "substantially equivalent" events. *Id.*, at 854-55.

Petitioner first argues that the public utility excise tax fails the second prong of the *Fulton* test because it is imposed at a nominal rate of 4.75%, while the use tax, which applies to gas sold by out-of-state marketers, is imposed at a higher base rate of 5% (with a possible addition of up to 2% by local governments). Pet. Brief 17-18. That argument (which completely ignores both the PUCO and OCC maintenance taxes) fails to recognize the difference between the nominal and effective tax rates. As previously explained, the effective rate of the gross receipts taxes significantly exceeds the effective rate of the use tax (under the facts shown on the record of this case), even if a local government were to increase the use tax by the maximum amount permitted by law.

Petitioner also argues that the public utility excise tax fails the third prong of the *Fulton* test, because the excise

and use taxes are imposed upon different entities (the customer in the case of the use tax; the utility in the case of the public utility excise tax), and therefore cannot fall on substantially equivalent events. Pet. Brief 17-18. Although actual incidence upon the same class of taxpayers is essential to a finding that two taxes are complementary, the Court has recognized that there are instances in which the nominal and actual incidences of a tax fall upon different entities. *Fulton Corp.*, 116 S.Ct. at 858. The most obvious example occurs where a "nominal taxpayer can pass [the tax] through to other parties, like consumers." *Id.*

That is precisely the situation here. As two noted authorities have explained, "[w]here public utilities are concerned . . . the tax burden is shifted to consumers through the rates charged for service. This results from the fact that regulatory law and commission practice require taxes payable to be recognized as proper costs of service." P. Garfield and W. F. Lovejoy, Public Utility Economics 392 (1964). Under Ohio law, the gross receipts taxes are included in utility rates along with other operating expenses, and any increases in tax expense resulting from increases in the public utility excise tax rate may be recovered by utilities through a separate tariff filing outside the normal rate case process. Ohio Rev. Code Ann. §§ 4909.15 and 4909.161. This is clearly enough to shift the actual incidence of these taxes from the utility to the consumer, and to satisfy the third prong of the *Fulton* test by showing that the "real taxpayers are within the same class . . . " 116 S.Ct. at 858.

Moreover, it is abundantly clear, from a practical standpoint, that the sales and use taxes and the gross receipts taxes fall upon substantially equivalent events: the

purchase and consumption of natural gas by retail customers. In all cases, these taxes are applied to the receipts from retail sales of natural gas, "whether they come from the sales proper or are the 'gross receipts' of utilities that are subject to the excise tax . . . " *Haefner* v. *City of Youngstown*, 68 N.E. 2d. at 67.[11] To suggest otherwise is to ignore economic reality (since the customer ultimately pays the tax in all cases) and to base one's determination on "legal abstractions," rather than "dollars and cents." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70.[12] Therefore, if the Court finds that the *Fulton* test is applicable to the facts of this case, it should likewise find that both the public utility excise tax and the other gross receipts taxes assessed upon public utilities are "compensatory taxes" that fully satisfy the requirements of that test.

---

[11] In this regard, the Ohio gross receipts and use taxes are clearly distinguishable from the taxes challenged in other recent cases, which applied to events that were *not* substantially equivalent, such as earning income and disposing of waste, *Oregon Waste Systems* v. *Department of Environmental Quality*, 114 S.Ct. 1345 (1994), manufacturing and wholesaling tangible goods, *Tyler Pipe Industries* v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987), *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984), and the severance of natural resources from the soil and the use of resources imported from other states. *Maryland* v. *Louisiana*, 451 U.S. 725 (1981).

[12] To assure comparability, Columbia has deliberately limited this analysis to transaction-based taxes which are occasioned by the purchase and consumption of natural gas. Columbia has not, for instance, addressed the state's general property tax (which is assessed upon gas utilities at a rate which is more than three times the rate assessed upon other, non-utility businesses) (Ohio Rev. Code Ann. § 5727.111(C)), or other taxes, such as the assessment used to fund the state's pipeline safety operations (Ohio Rev. Code Ann. § 4905.92), which applies to natural gas utilities but not to natural gas marketers or other businesses that do not own or operate pipeline facilities.

In conclusion, Petitioner has failed to sustain its burden of showing that "whatever distinction there existed in form, there was any substantial discrimination in fact." *Gregg Dyeing Co.* v. *Query*, 286 U.S. at 482. There is no basis, on the record of this case, for concluding that the existing Ohio statutory scheme discriminates against out-of-state gas marketers or in favor of local natural gas utilities. If anything, it does just the opposite. Since there is no basis in the Commerce Clause for invalidating a tax which discriminates against an *intrastate* entity, Petitioner's Commerce Clause claim should be rejected.

B. The Ohio statutory scheme does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioner also claims that the Ohio use tax violates the Equal Protection Clause of the Fourteenth Amendment. This argument, like Petitioner's Commerce Clause claim, is predicated upon the contention that the use tax discriminates against out-of-state marketers and in favor of "local" public utilities.

Assuming, *arguendo,* that Petitioner has standing to assert such a claim (even though Petitioner is clearly not an out-of-state marketer, and is therefore not a member of the supposedly disadvantaged class), that argument also fails for the reasons set forth in the preceding section. Petitioner has failed to show that the existing Ohio statutory scheme, as applied to the facts of this case, either discriminates against out-of-state gas marketers or in favor of natural gas utilities. The Ohio Supreme Court properly rejected that argument, and its judgement should be affirmed.

CONCLUSION

For the foregoing reasons, Columbia urges the Court to reject the arguments presented by Petitioner and its supporting *amici*, and affirm the judgement of the Ohio Supreme Court.

Respectfully submitted,

ANDREW J. SONDERMAN
KENNETH W. CHRISTMAN
(Counsel of Record)
200 Civic Center Drive
P. O. Box 117
Columbus, Ohio 43216-0117
(614) 460-4655

Counsel for Amicus Curiae
Columbia Gas of Ohio, Inc.